

OCT 28 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BERNARDO CARLOS,

Defendant - Appellant.

No. 04-50499

D.C. No. CR-03-03084-DMS
Southern District of California,
San Diego

ORDER

Before: WALLACE, SILVERMAN, and CALLAHAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Silverman and Callahan have voted to reject the suggestion for rehearing en banc and Judge Wallace so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

Because appellant was sentenced under the then-mandatory Sentencing Guidelines, we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the

Guidelines were advisory, and appellant has requested a remand, we remand to the sentencing court to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc) and *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error).

REMANDED.